No. 15,997

United States Court of Appeals

For the Ninth Circuit

WILLIAM DANIEL STRAIGHT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

Appellant was convicted on the 30th day of April, 1957, after a jury trial in the District Court for the District of Alaska, Third Judicial Division, the Honorable J. L. McCarrey, Jr. presiding, of a violation of Section 65-4-12 ACLA 1949. The Court imposed a sentence of imprisonment for a term of nine years on the 30th day of July, 1957. The execution of said sentence has been stayed pending appeal to the United States Court of Appeals for the Ninth Circuit. Jurisdiction in this Court is conferred by Title 28 U.S.C. Section 1291.

STATEMENT OF THE CASE.

A. Pleadings.

An indictment was brought by the grand jury for the Third Judicial Division, District of Alaska charging the defendant with the crime of rape. The statute involved was Section 65-4-12 ACLA 1949.

B. The Facts.

During the early fall of 1956 defendant and his fourteen year old daughter went moose hunting. One of the nights during the trip the defendant had an act of sexual intercourse with his daughter. That act gave use to the indictment. The case was tried to a jury and the defendant was convicted.

QUESTIONS INVOLVED.

Appellant contends that during the course of the trial, prejudicial error was committed in the Court's rulings, conduct of the prosecutor, and the Court's instructions to the jury.

Appellee contends that the Court's rulings were correct, and that the conduct of the prosecutor was not such as to prejudice the defendant in view of the Court's instructions to the jury, and that the instructions were legally correct. Appellee further contends that appellant waived his right to complain upon appeal on several of the specifications of error for the reason that defendant failed to make timely objections at the time of trial.

ARGUMENT.

Defendant specifies assignments of error. (Appellant's Brief pp. 6-11 incl.) He argues his specifications of error on pages 24 through 41. He lists an "Argument on the Facts" on page 24 (Appellant's Brief) but assigns no error of law relating to the argument. Therefore the government will not argue defendant's "Argument on the Facts."

ERROR NUMBER ONE.

Pages 6 and 29, Appellant's Brief.

THE COURT ERRED IN DENYING THE MOTION FOR MISTRIAL MADE AFTER THE COMPLAINING WITNESS ANSWERED TO THE EFFECT THAT SHE HAD TAKEN A LIE-DETECTOR TEST, ON THE GROUND THAT APPELLANT WAS HIGHLY PREJUDICED THEREBY.

The government agrees with the defendant that the information adduced by the prosecutor (T 17) was improper. It should not have been asked. The Court corrected the error (T 20) by instructing the jury to disregard the answer. The statement made by the witness was not so prejudicial that an instruction by the Court could not cure it. Defendant cites *Hines v. Powell,* 15 S.W. 2d 1060 Court of Civil Appeals, Texas (1929). It is a civil case and the error is not at all similar to the present fact situation.

In *Leeks v. State,* 245 Pac. 2d 764, Criminal Court of Appeals Oklahoma (1952) several officers testified at great length in regard to the lie detector test given Hobart Darrel Leeks. The Supreme Court said that was prejudicial error. In the present case, the refer-

ence to such test was a one line statement by a witness, not an officer.

The prosecutor in the present case was directed by the Court not to continue questioning the witness concerning the test and the prosecutor refrained.

ERROR NUMBER TWO.

Pages 6 and 30, Appellant's Brief.

THE COURT ERRED IN ALLOWING THE CASE TO GO TO THE JURY ON THE GROUND THAT IN A TRIAL INVOLVING A SEX OFFENSE, THE COMPLAINING WITNESS SHOULD BE EXAMINED BY A DOCTOR AND A PSYCHIATRIST.

There is no requirement in the common law or in the Alaska statutes that the complaining witness be required to submit to a psychiatrist. The evidence in the present case did not indicate that such an examination was warranted. Counsel for the defendant had the opportunity to request the Court to have the witness examined had he believed it necessary. He did not do so. His cross-examination was quite short and brought forth no indication that the complaining witness was either mentally ill or lying.

ERROR NUMBER THREE.

Pages 6 and 31, Appellant's Brief.

THE COURT ERRED IN INSTRUCTING THE JURY AS FOLLOWS: "THE ESSENTIAL ELEMENTS WHICH THE GOVERNMENT MUST PROVE TO WARRANT CONVICTION OF THE DEFENDANT OF THE CRIME CHARGED IN THE INDICTMENT ARE: FIRST, . . .; SECOND, THAT BETWEEN THE 20TH DAY OF AUGUST, 1956, AND THE 20TH DAY OF SEPTEMBER, 1956, AT OR NEAR PALMER, THIRD JUDICIAL DIVISION, TERRITORY OF ALASKA, THE DEFENDANT CARNALLY KNEW AND ABUSED ANNETTA MARIE STRAIGHT; AND . . ." R. Par. 6, p. 6.

Defendant failed to make any objection to the Court's instructions at the time of trial. (R. 126.) Failure to make timely objections at time of trial results in waiver of any error conferred therein. *Booth v. United States,* 57 F2d 192 (10th CCA 1932); *Davis v. United States,* 78 F2d 501 (10th CCA 1935); *Jenkins v. United States,* 58 F2d 556 (4th CCA 1932).

Further, the element of time was not of the essence in the present case; the Court's instruction (R. par. 2, p. 5) which instructed that the exact date was not material provided the crime occurred within five years prior to date of indictment was merely explanatory by way of illustration of the fact that the exact date is not material. The two instructions are not in conflict.

ERROR NUMBER FOUR.

Pages 7 and 34-37, Appellant's Brief.

COURT'S INSTRUCTION ON SCRUTINY TESTS.

The defendant asked the Court to instruct the jury not to consider the remarks of the prosecutor about

scrutiny tests. The request appears (R. 127) and the requested instruction was given very nearly in defendant's own language. (R. 128.) Defendant cannot now complain. The defense counsel then stated the instruction by the Court was satisfactory. (R. 128.) The defendant cannot now complain. *Sheperd v. United States,* 62 F2d 683 (10th CCA 1933).

ERROR NUMBER FIVE.

Pages 8 and 37, Appellant's Brief.

ERROR OF INSTRUCTION PERTAINING TO THE COURT'S ADMONITION TO JURY TO DISREGARD STATEMENT OF THE PROSECUTOR.

It was requested by defense counsel. (R. 118.) The point is similar to assignment of error number four.

ERROR NUMBER SIX.

Pages 9 and 38, Appellant's Brief.

CORROBORATION OF FEMALE WITNESS.

In common law corroboration of female was not necessary in a rape case. Under various state statutes corroboration is required. However, Alaska law does not require corroboration. There is no statute on the subject. Hence the common law rule prevails. 65-1-3 ACLA 1949.

ERROR NUMBER SEVEN.

Pages 9 and 39-40, Appellant's Brief.

INSTRUCTION ON LEGAL PRESUMPTIONS, SPECIFICALLY, THAT THE NORMAL PERIOD OF GESTATION IS 283 DAYS.

The fact that a child was born of the act of sexual intercourse is of no consequence. Therefore, no instruction on it was necessary or even proper. Further, defendant did not even request it. *Sheperd v. United States, supra.*

ERROR NUMBER EIGHT.

Pages 9-10 and 40, Appellant's Brief.

THE COURT ERRED IN DENYING THE MOTION FOR A NEW TRIAL ON THE GROUNDS MENTIONED THEREIN.

This ground not argued by the defendant. Therefore, the government will not argue it.

ERROR NUMBER NINE.

Pages 10 and 40, Appellant's Brief.

NEGLIGENCE OF DEFENSE TRIAL COUNSEL IN THE CONDUCT OF THE TRIAL.

What appellant's counsel on appeal might have done if he were trial counsel is not a basis upon which to predicate error. Trial counsel is an able member of the bar and he exercised sound judgment in his trial of the case. In order to obtain reversal or a new trial of a cause on the ground of negligence on the part of the defense counsel, the incompetency must be of such a nature as to deprive the defendant of a fair trial and to reduce the trial to a farce or sham.

Hendrickson v. Overlade, Warden, 131 F. Supp. 501 U.S.D.C. South Bend Division (1955).

Where defense counsel was experienced and exercised good judgment, conviction will not be reversed. *Norman v. United States,* 100 F2d 905 (6th CCA 1939). There is no showing that defense counsel did not exercise sound judgment.

CONCLUSION.

The weight of the evidence supports the verdict of the jury. An Appellate Court sits in judgment on errors of law and may not substitute its own judgment based on the facts, unless as a matter of law there is insufficient evidence to warrant a conviction.

The errors defendant alleges were not prejudicial to him. The ruling of the Court were in accord with Alaska and federal law. The conviction should be sustained.

Dated, Anchorage, Alaska,
August 12, 1958.

Respectfully submitted,

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